Counsel for Petitioner

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TABLE OF CASES

Supreme Court of the United States

OCTOBER TERM, 1942

No. 707

BENJAMIN W. FREEMAN,

Petitioner,

v.

BEE MACHINE CO., INC.,

Respondent.

BRIEF FOR PETITIONER

(Defendant-Appellee below.)

THE OPINIONS OF THE COURTS BELOW

The opinion of the District Court (Rec. p. 107) has been reported in 42 Fed. Supp. 938. The opinion of the District Court (Rec. p. 100) on the contract issue is reported in 41 Fed. Supp. 461.

The opinion in the Circuit Court of Appeals for the First Circuit (Rec. p. 117) is dated November 6, 1942, and reported in 131 F. (2d) 190.

JURISDICTION

The certiorari petition was filed on or about February 4, 1943, and the writ granted on or about March 15, 1943. This case is here on such a writ of certiorari under the provisions of section 240 of the Judicial Code (28 U. S. C. A. Sec. 347).

THE ISSUE

The primary issue in the case is whether after removal of an action from the state court to a federal court, the plaintiff may be allowed to amend to state a claim for treble damages under the antitrust laws, of which the state court would not have had jurisdiction.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the First Circuit erred in holding that it is proper for a District Court to permit an amendment of a complaint in a case removed from a State Court for the addition of a cause of action under the Antitrust laws of the United States, of which cause the State Court had no jurisdiction, and based on a state of facts unrelated to those of the removed cause. In so holding, the Court of Appeals has misinterpreted the decisions in the cases of *Minnesota* v. *United States*, 305 U. S. 382; *Lambert Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377, and *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U. S. 261, and construed the law oppositely to its construction in various District Courts, when it held that the rule of these cases applied only when there was complete lack of jurisdiction in the State Court over the removed cause in the first instance.

2. The Circuit Court of Appeals for the First Circuit erred in disregarding completely the established theory of derivative jurisdiction in removal causes.

STATEMENT OF THE CASE

The respondent in June, 1937, brought suit in the United States District Court, Southern District of Ohio, Western Division, against the petitioner, a resident of Ohio, based upon a contract entered into between the respondent and

the petitioner on November 29, 1933. Trial was had and by a decision rendered August 14, 1939, Judge Nevin decreed that the said contract had been canceled by petitioner for cause or breach of condition justifying the cancellation upon petitioner's part (Rec. p. 75). Appeal was taken by respondent to the Circuit Court of Appeals for the Sixth Circuit, and on June 6, 1941, the decree of Judge Nevin was affirmed by that Court without opinion (Rec. p. 93.)*

Notwithstanding this, respondent during pendency of its appeal on March 3, 1941, brought suit against petitioner in the Superior Court of Essex County, Massachusetts, in an action of contract for damages for breach by petitioner of the said contract of November 29, 1933, having secured service upon petitioner by catching him at a hotel in Boston, Massachusetts (Rec. p. 5).

Diversity of citizenship thus existing, the action was removed by petitioner to the United States District Court for the District of Massachusetts, and on May 15, 1941, petitioner filed a motion for summary judgment upon the ground that the issue raised by the action was res judicata as a result of the decree of the United States District Court for the Southern District of Ohio, entered October 7, 1939, pursuant to the aforesaid decision of Judge Nevin. On October 6, 1941, Judge Brewster sustained the motion for summary judgment on the ground of res adjudicata by the decree of the Ohio District Court, then affirmed by the Circuit Court of Appeals for the Sixth Circuit (Rec. p. 100), holding:

> "The facts established beyond controversy prevent a recovery in this action. No genuine issue of a material fact remains to be considered."

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* This cause in the Sixth Circuit is still pending on the issue of infringement by respondent on petitioner's patents.

As stated by Judge Brewster:

> "On the day before the hearing on defendant's (petitioner's) motion for a Summary Judgment, the plaintiff (respondent) filed a motion to add to its complaint a new cause of action."

This proposed new cause of action was entitled: "Added Amended Complaint for Triple Damages under the Antitrust Laws of the United States" (Rec. p. 95), and was obviously for the purpose of substituting for the original action in contract, which was without foundation or merit, an independent cause of action in tort based upon alleged violation of the Federal Antitrust Laws. Hearing was had by Judge Brewster upon this motion, and by an opinion rendered January 16, 1942, he held that the proposed action was entirely distinct from the original action, that the jurisdiction of the Federal Court in this removed action was derivative and that the District Court was without jurisdiction to entertain the proposed cause of action because it was outside the jurisdiction of the State Court (Rec. p. 107).

Thereupon a decree for summary judgment in favor of the defendant was entered January 16, 1942 (Rec. p. 111).

Respondent then appealed to the Circuit Court of Appeals for the First Circuit from the said decree dismissing the complaint as *res adjudicata* and from the denial of its motion to amend the complaint to add the new cause of action.

On November 6, 1942, the United States Circuit Court of Appeals for the First Circuit handed down its opinion and decision on the aforesaid appeal, sustaining the District Court on its summary judgment dismissing the complaint, and remanding the case to the District Court to exercise his discretion as to whether or not to deny petitioner's motion to amend the complaint to add an action for triple

damages under the Antitrust laws of the United States, but reversing the District Court on the jurisdictional point upon which he had expressly denied the petitioner's motion.

In deciding this issue, the Court of Appeals said:

> "But the action in the case at bar was begun in a court of the Commonwealth of Massachusetts, a court which, although it had jurisdiction over the claim for breach of contract, did not have jurisdiction over the claim under the antitrust laws. 15 U. S. C. Sec. 15; *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436, 440. For this reason the court below held that it did not have jurisdiction to allow the amendment because the only jurisdiction which it had derived from the jurisdiction of the Massachusetts Court. There are authorities squarely in support of this view (*Carroll* v. *Warner Bros. Pictures*, 20 F. Supp. 405; *Noma Electric Corp.* v. *Polaroid Corp.*, 2 F. R. D. 454), but they are not binding upon us and we decline to follow them."

The reasoning of the Court of Appeals was based on the assumption which we contend to be erroneous, that the authorities of this Court, relied upon by the District Court in its refusal to permit the filing of the new action as an amendment, did not apply, because those cases *merely* held that if the state court action was one over which it had no jurisdiction in the first place, then the Federal Court did not acquire jurisdiction. Since the original state action, although it was dismissible on the ground of res adjudicata, still did present subject matter over which the state court had jurisdiction, then, in the opinion of the Court of Appeals, this gave the Federal Court a right to consider any and all other actions which might be added by either party, whether within the original jurisdiction of the state courts or not. As to the right of plaintiff to file the proposed action as an amendment when and under the circumstances it had done so, this was held to be a

discretionary matter which the District Court was left to decide.

ARGUMENT

The first paragraph of petitioner's "Added Amended Complaint for Treble Damages under the Anti-Trust Laws of the United States" is as follows:

> "1. The Action arises under the Anti-Trust Laws of the United States, Title 15 U. S. Code, Sections 1-27, and particularly Section 15 thereof, to recover three-fold the damages sustained by the plaintiff and the costs of the suit, including a reasonable attorney's fee." (Rec. p. 95.)

Actions which are based solely upon the Federal Anti-trust Laws can be brought only in the Federal Courts, wherefore the petitioner seeking to add a cause of action by way of amendment to a complaint on a contract which was originally brought in a State Court and has arrived in the Federal Court by way of the removal statutes, which cause of action could never have been entertained by the State Court.

The doctrine referred to by Justice Brandeis in *Minnesota* v. *United States,* 305 U. S. 382, seems completely applicable to the present cause. In the decision Justice Brandeis says the following on page 389:

> "As Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal. For jurisdiction of the federal court is in a limited sense a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction."

What is meant by the characterization "in a limited sense a derivative jurisdiction" is that the Federal Court

has the jurisdiction of the State Court, but only in actions which could have been brought in the Federal Court because of diversity of citizenship, or for other reasons given in the statutes. The Removal Statutes are to be found in Title 28, Sections 71 to 83, U. S. C. A.

This rule was also stated in the case of *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U. S. 261, wherein Justice Van Devanter states the following on page 288:

> "When a cause is removed from a state court into a federal court the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated. *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, 131 et seq.; *Cowley* v. *Northern Pacific R. R. Co.*, 159 U. S. 569, 583; *De Lima* v. *Bidwell*, 182 U. S. 1, 174; *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377.
>
> "It follows that so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice."

In the case of *Howe* v. *Atwood et al.*, 47 Fed. Sup. 979, decided October 13, 1942, a suit for royalties under a patent license was brought in a Michigan State Court and removed to the Federal Court by the defendant, whereupon the plaintiff presented an amendment to the complaint setting up an action for infringement of the licensed patents. The District Court quoted from *Minnesota* v. *United States*, 305 U. S. 382, and from *Noma Electric Corp.* v. *Polaroid Corp.*, 2 Fed. Rules Dec. 454, as to the jurisdiction of the Federal Court in a removed action, and said:

> "Here, however, plaintiff amended his own bill of complaint asking injunction against further infringe-

ment. May he not then voluntarily enlarge the scope of the jurisdiction? The answer we believe is correctly given above and in *DeLima* v. *Bidwell,* 182 U. S. 174, where the court states:

" 'Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place.'

"Both *Minnesota* v. *United States* and *Noma Electric Corporation* v. *Polaroid Corporation,* supra, were decided subsequent to adoption of the new civil rules so it is apparent that those rules neither extended nor limited jurisdiction of the district court. In fact, they so provide (Rule 82)."

It is interesting to note that the above decision mentions the fact that both Justice Brandeis' decision in *Minnesota* v. *United States* and *Noma Electric Corporation* v. *Polaroid Corporation* were decided *since* the New Rules of Federal Procedure.

Prior to the new rules, it is doubtful if plaintiff could, under the guise of an "amendment," file a new cause of action in any cause, without a new service upon the defendant. We have not raised the point in the present matter, for simplicity sake, but do not concede that it is proper even under the new rules.

This same rule was followed in *Carroll* v. *Warner Brothers Pictures,* 20 Fed. Supp. 405, a case completely parallel to the present case. In the *Carroll* case the State Court had jurisdiction of the original cause of action, which was not based on a Federal statute, and thus attempted to add another cause of action under the Federal statute after removal. Judge Laibell in the District Court in New York held that, since the Federal Court had only a derivative jurisdiction, the situation was the same as if the cause of action under the Federal statute had been attempted to be made part of the original action in the State Court. The rule has been followed in *Noma Electric*

Corporation v. *Polaroid Corporation*, 2 Fed. Rules Dec. 454 (Southern District of New York).

In the *Noma* case, the Court was urged that Sec. 81 of Title 28 U. S. C. A., and Rule 81(c) of the Federal Rules of Civil Procedure govern the situation, once the cause is in the Federal Court.

U. S. C. A. Sec. 81 reads as follows:

> The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

Rule 81(c) reads as follows:

> "Removal Actions. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States."

The District Court in the *Noma* case ruled as follows on this point:

> "Defendant urges that Section 38 of the Judicial Code, 28 U. S. C. A. Sec. 81, and Rule 81(c) of Fed-

> eral Rules of Civil Procedure, 28 U. S. C. A. following section 723c, govern the situation and permits it to proceed as if the suit had been originally commenced in the federal court. It is true that such would be the correct procedure if the court had jurisdiction. But Rule 82 of the Federal Rules of Civil Procedure expressly provides that these rules shall not be construed to extend or limit the jurisdiction of the district court. See *Barnsdall Refining Co.* v. *Birnamwood Oil Co.*, D. C., 32 F. Supp. 314."

While Judge Leibell did not discuss the statutory section 81, above quoted, it is clear that this is a procedural section of the statute, not one which relates to jurisdiction.

We cite these decisions from the District Courts because they recite the current conclusions drawn by the bench from the recent holdings of this Court. The decision of the Court of Appeals in the present matter turned toward a criticism of these nisi prius rulings, based on a comment thereon of Mr. Moore in his recent text on the New Federal Rules.

Indeed the Court of Appeals based its conclusions on a quotation from Moore's Federal Practice under the New Federal Rules, Sec. 15.01 as follows:

> "The holding of the instant case compels the plaintiff to institute a separate action for violation of the anti-trust laws. But if this is done and the action is brought in the federal district court where the removed action is pending, the court may consolidate it with the removed action pursuant to Rule 42. Since federal jurisdiction will not be enlarged by the amendment, practical considerations justify amendment in situations of this kind."

The above quotation from Moore has no foundation in the authorities at all. It talks about the hardship of the plaintiff and completely disregards the hardship of the defendant in

following Moore's theory. The respondent in the present case was served in a hotel room in Boston and exercised his constitutional right of removal to the Federal Court. If the respondent had not exercised the right of removal and had permitted the case to remain in the State Court, which he could have done, he would never have been subjected to this new cause of action, unless he were sued separately in the Federal Court *and proper service were first had upon him.* For this reason the exercising of a right by the respondent, which right is supposed to benefit him, would, in effect, penalize him.

Moore in his discussion states:

> "Had the fourth count [charge of violation of the Federal Antitrust Laws] appeared in the complaint filed in the State Court, dismissal of that count for lack of jurisdiction, after removal, would have followed the doctrine of the *General Investment Co.* v. *Lake Shore & Michigan Southern Ry.* case."

His theory then is that, if the complaint in the State Court originally contained a cause of action of which the State Court had jurisdiction and a cause of action under the Federal Antitrust Laws, and the case was then removed to the Federal Court, the cause of action under the Federal Trust Laws would have to be dismissed in view of the decisions of this Court, but that after it was dismissed the plaintiff could then move to amend the complaint by setting up a cause of action under the Federal Antitrust Laws. This would appear to be an absurdity on its face.

The Circuit Court of Appeals in its opinion states that this Court in the cases of *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377; *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U. S. 261, and *Minnesota* v. *United States*, 305 U. S. 382, had under consideration actions—

> ". . . over which a state court had no jurisdiction was removed to a federal court, and it held that, the state court having no jurisdiction the federal court could acquire none upon removal even though the federal court would have had jurisdiction if the action had originally been brought in that court. The reason for this rule appears to be that because of lack of jurisdiction there was, legally speaking, no action pending in the state court and hence no action which could be removed to the federal court."

But this statement is, we respectfully submit, incorrect certainly with respect to *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.* The facts of this case appear in the opinion of the Circuit Court of Appeals for the Sixth Circuit, 269 Fed. 235, 238-241, where the cause of action based upon violation of the Constitution and laws of Ohio was discussed at length and it was concluded:

> ". . . we think it was not only within the power, but it was the duty, of the court below to consider whether a good case was made under the State laws."

Thus it is clear that there was a cause of action in the original complaint of which the State Court had jurisdiction when the cause was removed to the Federal Court and this Court considered the allegations of the bill as to the right of relief under the Ohio State Constitution and laws and held that a right to equitable relief was not shown, and dismissed this part of the bill as well as that part charging violation of the Federal Antitrust Acts.

It is true that this Court observed that there was some ground for thinking that the cause of action under the State laws was something of a makeweight, but it was clearly sufficient to require and to receive consideration and action by the Court. Certainly, the original cause of action in the case here at bar was no more substantial, because the record

here shows, as we have pointed out, that the respondent here as its only cause of action set forth one which was entirely without merit being res adjudicata as finally determined by the Circuit Court of Appeals.

The sole difference on the facts between the present cause and the *General Investment* case, is that in this cause the defendant did not know that he was to be faced with a charge under the Antitrust laws when he removed to the federal court, whereas in the *General Investment* case, the defendant did know it. The right to object to federal jurisdiction was available to the defendant in the *General Investment* case.

This right cannot be taken from him by the subterfuge of an amendment to the complaint in the removed action. This is an underlying principle of the theory of "Derivative Jurisdiction" repeatedly confirmed by this Court. The Act of June, 1934, chapter 651, under which this Court established the Rules of Civil Procedure, explicitly provided that—

> "Said Rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant";

and Rule 82, made in accordance therewith, further specifically provides:

> "These Rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

This statute and this rule were for the very purpose of protecting a litigant against such a subterfuge. The proposed amendment to the complaint at bar seeks to do by indirection what cannot be done directly. It runs squarely counter to the fundamental policy of the removal of actions as defined by this Court. For example, in *Cowley* v. *Northern Pacific Railroad,* 159 U. S. 569, this Court said with respect to a removed action:

> ". . . it remains in substance a proceeding under the Statute, *with the original rights of the parties unchanged.*"

This Court took particular pains to emphasize the statement which we have italicized, saying:

> "If any action or proceeding in a State Court was subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal Court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal"—

and quoted from *Davis* v. *Gray,* 16 Wall. 223, 231:

> ". . . 'a party by going into a National Court does not lose any right or appropriate remedy of which he might have availed himself in the State Courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals.'"

The question of venue or jurisdiction of the person is not a matter lightly to be disregarded. It depends upon substantive law. The right of a person to be sued only in the district of which he is an inhabitant is carefully guarded by the general venue statute, Judicial Code, section 51, and, as stated in *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.,* 260 U. S. 261:

> ". . . its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district or wherever found."

Rule 81c—Civil Procedure surely does not contemplate any extension of jurisdiction and would not be valid to do so even if it did.

Being "found" is a sporadic, temporary thing, very different from being "an inhabitant." The petitioner Freeman was "found" at one particular time and subjected to suit on a cause of action in contract, and with which, under Massachusetts law [General Laws (Ter. Ed.) c. 231, sec. 7 (sixth)] could not be joined a cause of action in tort. The original cause of action was removed to the District Court, but this did not make Freeman "an inhabitant" so that he could be served at any time. The only way in which jurisdiction can be obtained of Freeman in this district for a cause of action under the Antitrust Laws is by having him "found" here. This result cannot be secured by "amending" an existing complaint, because it would not only violate the whole theory of venue, but it would be in direct violation of Rule 82, which is superior to Rule 15.

THE RESPONDENT'S POSITION

As we read the answering brief of respondent on our petition for writ of certiorari, it takes the position that by removing a cause to a federal court, the defendant thereby acknowledges and waives jurisdiction over his person for all purposes.

This Court in *Employers Reinsurance Corp.* v. *Bryant*, 290 U. S. 373, stated:

> "Obtaining the removal from the state court into the federal court did not operate as a general appearance by the defendant and as the service of process against it proved invalid, and it declined to appear voluntarily, the federal court was plainly without jurisdiction of the defendant although in other respects having jurisdiction of this suit."

The same ruling was made in *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261.

The respondent cites *In re Moore*, 209 U. S. 490, which was a case where both parties, neither of them citizens,

took a case to the federal court, filed amended pleadings, stipulations, etc., and this Court discussed whether they had both consented to the federal court to take the case.

Cowley v. *Northern Pacific R. Co.*, 159 U. S. 569, is cited, but in this case the Court had just previously stated:

> "a party going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State Courts of the same locality."

Respondent cites *De Lima* v. *Bidwell*, 182 U. S. 1, but that was a cause in which the Supreme Court stated as the general policy of removal, at page 174:

> "Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place."

Leman v. *Krentler Arnold Hinge Last Co.*, 284 U. S. 448, is relied upon, but this was not a removal case at all. No further comment on the authorities cited by respondent is believed necessary except to say that in reading the older cases, attention must be paid to the fact that the statutes have changed, which formerly permitted the plaintiff to remove as well as the defendant.

This change of the statutes indicates the general policy of Congress to strictly limit the jurisdiction of federal courts in removed causes, leaving removal essentially as a right of the party accused in other than his residence to avail himself of the less partisan tribunals which the federal courts afford.

This policy, which we urge indicates that derivative jurisdiction over a removed cause should not be so expanded as to permit of a federal action to be added over which the state court would not have had jurisdiction, is shown in such causes as *East Tennessee V. & G. R. Co.* v.

Southern Telegraph Co., 112 U. S. 746, where this Court said:

> "The courts of the United States on removal of the proceeding from the Probate Court, were clothed with no greater power in the premises than the courts of the State would have possessed, if their jurisdiction had been preserved (p. 310). . . . The remedy is statutory only and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which it alone can act."

In *Cowley* v. *Northern Pacific R. Co.*, 159 U. S. 569 (supra), in addition to the quotation already given, said (582):

> "If any action or proceeding in a state court were subject to be defeated or impaired by one of the parties exercising his statutory rights to remove it to a Federal court, no one would be safe in instituting such a proceeding in any case wherein by reason of diversity of citizenship or otherwise, it might be subject to removal."

This ruling was one in which the right of a plaintiff to bring an action as to which the law of his state applied was supported, as against an effort after removal by the defendant to obtain a remedy which the state proceeding did not offer. It should surely apply both ways and protect a defendant who removes a cause, against the plaintiff thereupon adding thereto an action or praying a remedy, which the state action could not have afforded.

In the same sense the ruling of this Court in *Rorick* v. *Devon Syndicate, Ltd.*, 307 U. S. 299, is in support of our contention when it held

> "plaintiff may obtain in the Federal court after removal such orders of attachment or garnishment as would have been available to him had he been permitted to remain in the state court." (p. 312.)

CONCLUSION

The fallacy of respondent's position is apparent on the facts of this case. It was able to catch the petitioner in Boston, by a statutory summons in contract for damages. It *thereafter* under the laws of Massachusetts prepared a declaration against the petitioner in which it set forth a trumped up charge as to a contract which it had clearly been held to have violated and which was cancelled because of its fault. The defendant then removed the cause to the federal court as would have been expected, whereupon the plaintiff sought to file an action under the Sherman Act, as if it were an amendment to its declaration, counting not in contract (which was the limit of the presence of the petitioner in the Massachusetts courts), but in tort.

By removing the original cause, the position taken by the respondent would indicate that the petitioner had subjected himself to this new action. The new action in tort, however, would not have been supportable on the original summons against petitioner in the state court, even if it had been within the jurisdiction of that court, since tort cannot be joined with contract in Massachusetts by statute which says [Genl. Laws (Ter. Ed.) c. 231, sec. 7 (sixth)]:

> "Actions of contract and actions of tort shall not be joined, but if it is doubtful to which division a cause of action belongs a count in contract may be joined with a count in tort with an averment that both are for one and the same cause of action."

Since there is no similarity here between the two actions, it is thus evident that petitioner could not have been held in the State Court in tort on the basis of the summons against him in contract (Rec. p. 2).

So we have a situation wherein petitioner is said to have deprived himself not only of a right to object to a federal action in a removed suit, but also to a suit in tort whereas

he was served only in a contract action. This would mean that he had lost greatly his rights by virtue of removal, and it is against the policy of the law for a defendant to be prejudiced thereby.

We maintain that the decisions of this Court have ruled directly on the point here involved, contrary to the Court of Appeals, in the *General Investment* v. *Lakeshore* case (260 U. S. 261) (supra), and that on reason and authority it can make no difference that the federal action there was filed as a joined cause of action as against being sought to be filed as an amendment to the bill of complaint after removal, in this cause.

This is not a matter of "red tape" in connection with procedure, because the right of removal to the federal courts is a matter of substantive right, the incidents to which have been carefully guarded both by Congress and this Court from the beginning of our jurisprudence.

Respectfully submitted,

MARSTON ALLEN,
NATHAN HEARD,
Counsel for Petitioner.